

ARKANSAS SUPREME COURT

No. CR 06-114

NOT DESIGNATED FOR PUBLICATION

CARL TICE
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered

November 16, 2006

APPEAL FROM THE CIRCUIT COURT
OF POPE COUNTY, CR 2003-180,
HON. DENNIS CHARLES
SUTTERFIELD, JUDGE

REVERSED AND REMANDED.

PER CURIAM

Carl Tice was found guilty by a jury of three counts of raping his daughter. He received a sentence of forty years' incarceration on each count to be served concurrently in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed. *Tice v. State*, CACR 03-1314 (Ark. App. Dec. 15, 2004). Subsequently, Tice timely filed in the trial court a *pro se* petition for post-conviction relief pursuant to Ark. R. Crim. P. 37.1, claiming prosecutorial misconduct, denial of due process and his failure to receive effective assistance of counsel during his trial. After a hearing on Tice's petition, the trial court dismissed the petition. Tice lodged an appeal in this court from that order.

Tice's post-conviction counsel on appeal to this court, Mr. Helms, has filed a brief asserting that any appeal of the denial of post-conviction relief would be wholly without merit and asking that he be allowed to withdraw as counsel. *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(j)(1) set requirements for the withdrawal of counsel for a defendant in a criminal case after a notice of appeal has been filed on the basis that an appeal is without merit.

Under the rule, a court-appointed attorney who wishes to withdraw from an appeal must abstract and brief all of the rulings that were adverse to the appellant. While a “no-merit” brief is typically filed in a direct appeal from a judgment, no-merit briefs in post-conviction appeals are also proper. *See Hewitt v. State*, 362 Ark. 369, ___ S.W.3d ___ (2005) (*per curiam*); *Brady v. State*, 346 Ark. 298, 57 S.W.3d 691 (2001) (*per curiam*).

In the instant case, the trial court appointed the Arkansas Public Defender Commission to represent Tice on his Rule 37.1 petition. The Commission moved to set aside the court’s appointment for a number of reasons, including that the Commission was not authorized by statute to handle civil matters, such as post-conviction petitions.

Tice maintains in his points on appeal that a hearing was held in March, 2005, where the Commission’s motion was argued to the court. He also contends that his motion for access to the trial transcript was considered at the hearing. Tice further alleges that at that hearing, the trial court instructed the Commission’s attorney, Mr. Dunham, to assist Tice in filing an amended Rule 37.1 petition. In an order dated April 29, 2005,¹ the trial court denied the Commission’s motion to set aside the appointment and instructed Tice’s trial attorney, Mr. Irwin, to provide to Mr. Dunham the trial transcript used in Tice’s direct appeal.

The hearing on Tice’s petition was originally set for June 13, 2005. On June 3, 2005, a different public defender, Mr. Riner, filed a motion for continuance on behalf of Tice. Riner cited additional time needed to review the trial transcript that the court had instructed Mr. Irwin to provide to Mr. Dunham as the basis for the continuance. The trial court continued the hearing until August

¹This order states that a hearing was held on April 25, 2005, but does not reference a hearing held in March. The transcript of this hearing is not contained in the record on appeal.

8, 2005.

On August 5, 2005, Mr. Helms, Tice's attorney who filed a no-merit brief in Tice's appeal of the court's denial of his post-conviction request, filed another continuance. In his motion, Helms stated that he had recently been appointed as the public defender for Johnson County, and needed more time to review the file and prepare for the hearing on Tice's petition. Helms made no mention of obtaining the transcript from Mr. Irwin or filing an amended petition. The trial court granted the motion and again continued Tice's trial until October 10, 2005.

On October 6, 2005, Mr. Helms again requested another continuance, stating that he needed time to consult with Tice to prepare for the hearing. On the same day, Mr. Helms filed a response to the State's motion for discovery, although the record on appeal does not contain a discovery motion filed by the State. Helm's response contained the name of thirteen witnesses he intended to call at the hearing. Further, Mr. Helms stated that he might potentially use the results of two rape kits conducted on the victim, and other documents, as evidence. The pleadings reflected that Mr. Helms still resided in Little Rock. The trial court again continued the hearing.

The hearing on Tice's Rule 37.1 petition was held on October 24, 2005, but no amended petition had been filed prior to the hearing. At the hearing, the trial court announced ready to proceed with the hearing on Tice's petition and asked if there were any motions to be heard. The State answered in the affirmative, but then argued the merits of the case. After the State made its points, Mr. Helms asked the court if the petition had been argued at an earlier hearing, referencing a hearing in February, 2005. The trial court responded that the Public Defender Commission's motion to set aside its appointment had been previously heard by the court, but the court did not recall that the merits of the petition had been adjudicated. The court emphasized that regardless of

any issue discussed at a prior hearing, the hearing before the court that day was to consider the merits of the petition as a whole.

In response to the State's argument that Tice's petition contained conclusory statements, Mr. Helms then argued that Tice had specific instances that would support the allegations contained in the petition. However, Helms failed to enumerate the specific information, call any witnesses or introduce any evidence. The trial court then announced that it would take the motion to dismiss under advisement. Subsequently, the court issued the following order:

Now on this date come before the court the Petition for a Rule 37 hearing, filed by Petitioner, Carl Tice. The Respondent appears by David Gibbons and the Defendant appears in person and represented by J. Michael Helms. The court orders [that] the Respondent's Motion to Dismiss is granted.

The record does not indicate that a motion to dismiss had been filed or that the State orally moved for dismissal at the hearing.

In his no-merit brief to this court, Mr. Helms maintains that Tice preserved no issue for appeal. Further, Helms contends that although Tice did the best job he was able to do with his *pro se* petition, Tice's allegations or proof were insufficient to obtain post-conviction relief.

In his points on appeal to this court, Tice complains that he was never able to review the trial transcript and that he was never given assistance by his post-conviction attorney to file an amended Rule 37.1 petition. Tice also maintains that he and Mr. Helms understood the October 24, 2005, hearing to be an evidentiary hearing and Mr. Helms had intended to call a number of witnesses and present evidence but was unable to do so. He asks that this matter be remanded to the trial court and that he be allowed to file an amended petition "to include information and specific facts now in Mr. Helm's possession."

We do not reverse a denial of post-conviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

In the instant matter, we look to the trial court's order to determine whether the standards of *Strickland* have been applied to Tice's claim of ineffective assistance of counsel² and whether the other claims have been considered. *Taylor v. State*, 340 Ark. 308, 9 S.W.3d 515 (2000) (*per curiam*). Rule 37.3(c) of the Arkansas Rules of Criminal Procedure provides that after a hearing, "[t]he court shall determine the issues and make written findings of fact and conclusions of law with respect thereto." Without exception, we have held that this rule is mandatory and requires written findings. *Dulaney v. State*, 338 Ark. 548, 999 S.W.2d 181 (1999) (*per curiam*).

If the trial court fails to make the required findings in accordance with the Rule, it is reversible error. *Morrison v. State*, 288 Ark. 636, 707 S.W.2d 323 (1986). We have also held that the requirement of written findings of fact applies to any issue upon which a Rule 37 hearing is held. *See Dulaney, supra* (citing *Bumgarner v. State*, 288 Ark. 315, 705 S.W.2d 10 (1986)). In *Dulaney*, we noted that without sufficient written findings by the circuit court on the points raised in the Tice's petition for post-conviction relief, this court is "unable to effectively review the evidence and the court's reasoning to determine if the court's conclusions were clearly against the preponderance of

²The general standard of review for considering claims of ineffective assistance of counsel, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), contains two prongs. A defendant must show first that counsel's performance fell below an objective standard of reasonableness. The second prong requires the errors to actually have had an adverse effect on the defense. *Strickland, supra*.

the evidence.” 338 Ark. at 549, 999 S.W.2d at 181.

Here, the trial court’s order did not make written findings of fact and conclusions of law as required by Ark. R. Crim. P. 37.3. Further, the trial court’s order is conclusory in nature with regard to Tice’s petition as a whole. None of the three bases for Tice’s petition were specifically addressed by the trial court, including his specific claim of ineffective assistance of counsel. For these reasons, the circuit court’s order is clearly erroneous.

If the record before this court conclusively shows that the petition is without merit, we will affirm despite the circuit court’s failure to make written findings. *Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999). However, in the instant matter, we are unable to affirm.

In the present matter, the record before this court indicates confusion that resulted, in part, from unknown instructions by the trial court at an earlier hearing that were not made part of the record. It is not clear that Tice’s third post-conviction attorney, Mr. Helms, acted in accordance with the trial court’s instructions nor is it clear that this attorney had complete knowledge of these instructions, as he did not attend the earlier hearing. According to Tice, the trial court granted him the right to file an amended petition with the assistance of counsel; however, no amended petition was filed. Whether Tice’s contention is accurate cannot be determined by the record before this court. Moreover, the trial court’s reference to a motion to dismiss, despite the record on appeal indicating that no motion to dismiss had been filed, further indicates confusion at the trial court level with regard to matters surrounding Tice’s Rule 37.1 petition.

As a result, the order is reversed and the matter remanded to the trial court. On remand, the trial court is directed to review instructions given to Tice’s post-conviction counsel to determine compliance by counsel. In its final order disposing of Tice’s petition, the trial court should issue an

order that comports with Rule 37.3(c). Finally, if a subsequent appeal is filed from an adverse order in this matter and the petitioner opts to appeal, counsel should ensure that a complete record is lodged in this court.

As the instant matter is not concluded, counsel's request to withdraw is denied.

Reversed and remanded; counsel's request to withdraw is denied.